REGINA v. R

HOUSE OF LORDS
LORD KEITH OF KINKEL, LORD BRANDON OF OAKBROOK, LORD GRIFFITHS, LORD ACKNER AND LORD LOWRY
23 OCTOBER 1991

CRIMINAL LAW: Rape - Husband and wife living apart - Husband attempting sexual intercourse with wife against her will - Whether husband immune from criminal liability - Sexual Offences (Amendment) Act 1976 s. 1(1).

The appellant was charged on indictment with rape and assault occasioning actual bodily harm. The appellants' wife had left the matrimonial home as a result of matrimonial difficulties. While the wife was staying at her parents' house, the appellant forced his way in and attempted to have sexual intercourse with her, in the course of which attempt, he assaulted her.

The appellant was convicted of attempted rape and assault occasioning actual bodily harm and he appealed against his conviction for attempted rape.

His appeal was dismissed by the Court of Appeal (Criminal Division) which certified that a point of law of general public importance was involved in the decision, namely whether a husband can be criminally liable for raping his wife and granted leave to appeal to the House of Lords.

Held:

[1] There was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband and therefore a husband could be convicted of rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse.

[2] Section 1(1) Sexual Offences (Amendment) Act 1976 did not give statutory recognition to and perpetuate the former rule.

Per curiam: The word "unlawful" in s. 1(1) of the Act of 1976 is mere surplusage and should be ignored.

[Appeal dismissed. Appellants' conviction upheld.]

Cases referred to:

H.M. Advocate v. Duffy [1983] SLT 7 (cit)
H.M. Advocate v. Paxton [1985] SLT 96 (cit)
McMonagle v. Westminister City Council [1990] 2 AC 716; [1990] 2 WLR 823; [1990] 1 All ER 993 HL(E) (cit)
Reg. v. C. (Rape: Marital Exemption) [1991] 1 All ER 755 (cit)
Reg. v. Caswell [1984] Crim. LR 111 (cit)
Reg. v. Chapman [1959] 1 QB 100; [1958] 3 WLR 401; [1958] 3 All ER 143 CCA (cit)
Reg. v. Clarence [1888] 22 QBD 23, CCR (cit)
Reg. v. H. (unreported), 5 October 1990, Auld J. (cit)
Reg. v. J. (Rape: Marital Exemption) [1991] 1 All ER 759 (cit)
Reg. v. Jackson [1891] 1 QB 671 CA (cit)
Reg. v. Kowalski [1987] 86 Cr. App. R. 339, C.A. (cit)
Reg. v. Miller [1954] 2 QB 282; [1954] 2 WLR 138; [1954] 2 All ER 529 (cit)
Reg. v. O'Brien (Edward) [1974] 3 All ER 663 (cit)
Reg. v. Roberts [1986] Crim. L.R. 188, CA (cit)
Reg. v. S. (unreported), 15 January 1991, Swinton Thomas J. (cit)
Reg. v. Sharples [1990] Crim. LR 198 (cit)
Reg. v. Steele [1976] 65 Cr. App. R. 22, CA (cit)
Rex. v. Clarke [1949] 2 All ER 448; 33 Cr. App. R. 216, CCA (cit)
S. v. H.M. Advocate, [1989] SLT 469 (cit)

Legislation referred to:

Sexual Offences Act 1956, ss. 1, 19
Sexual Ofences (Amendment) Act 1976, s. 1(1)

Other sources referred to:

Archbold's, A Summary of the Law Relative to Pleading and Evidence in Criminal Cases, 1st Edn. @ p. 259
History of the Pleas of the Crown [1736] Vol. 1, ch. 58 by Sir Matthew Hale @ p. 629
Hume's Criminal Law of Scotland, 4th Edn. Vol. 1 p. 306
Treatise of the Pleas of the Crown [1803] Vol. 1, ch. X by East @ p. 446

For the Appellant - Graham Buchanan
For the Crown - John Milmo Q.C. and Peter Joyce Q.C.

Their Lordships took time for consideration.

JUDGMENT

Lord Keith of Kinkel:

My Lords, in this appeal to the House with leave of the Court of Appeal (Criminal Division) that court has certified the following point of law of general public importance as being involved in its decision, namely: "Is a husband criminally liable for raping his wife?"

The appeal arises out of the appellant's conviction at Leicester Crown Court on 30 July 1990, upon his pleas of guilty, of attempted rape and

of assault occasioning actual bodily harm. The alleged victim in respect of each offence was the appellant's wife. The circumstances of the case were these. The appellant married his wife in August 1984 and they had one son born in 1985. On 11 November 1987 the couple separated for about two weeks but resumed cohabitation at the end of that period. On 21 October 1989 the wife left the matrimonial home with the son and went to live with her parents. She had previously consulted solicitors about matrimonial problems, and she left at the matrimonial home a letter for the appellant informing him that she intended to petition for divorce. On 23 October 1989 the appellant spoke to his wife on the telephone indicating that it was his intention also to see about a divorce. No divorce proceedings had, however, been instituted before the events which gave rise to the charges against the appellant. About 9 p.m. on 12 November 1989 the appellant forced his way into the house of his wife's parents, who were out at the time, and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. The appellant was arrested and interviewed by police officers. He admitted responsibility for what had happened. On 3 May 1990 a decree nisi of divorce was made absolute.

The appellant was charged on an indictment containing two counts, the first being rape and the second being assault occasioning actual bodily harm. When he appeared before Owen J. at Leicester Crown Court on 30 July 1990 it was submitted to the judge on his behalf that a husband could not in law be guilty as a principal of the offence of raping his own wife. Owen J. rejected that proposition as being capable of exonerating the appellant in the circumstances of the case. His ground for doing so was that, assuming an implict general consent to sexual intercourse by a wife on marriage to her husband, that consent was capable of being withdrawn by agreement of the parties or by the wife unilaterally removing herself from cohabitation and clearly indicating that consent to sexual intercourse had been terminated. On the facts appearing from the depositions either the first or the second of these sets of circumstances prevailed. Following the Judge's ruling the appellant pleaded guilty to attempted rape and to the assault charged. He was sentenced to three years' imprisonment on the former count and to eighteen months imprisonment on the latter.

The appellant appealed to the Court of Appeal (Criminal Division) on the ground that Owen J.:

> made a wrong decision in law in ruling that a man may rape his wife when the consent to intercourse which his wife gives in entering the contract of marriage has been revoked neither by order of a court nor by agreement between the parties.

On 14 March 1990 that court (Lord Lane CJ, Sir Stephen Brown P, Watkins, Neill and Russell L.JJ.) delivered a reserved judgment dismissing the appeal but certifying the question of general public importance set out above and granting leave to appeal to your Lordships' House, which the appellant now does.

Sir Matthew Hale, in his *History of the Pleas of the Crown* [1736] vol. 1, ch. 58 p. 629, wrote:

> But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.

There is no similar statement in the works of any earlier English commentator. In 1803 East, in his *Treatise of the Pleas of the Crown*, vol.1 ch. X, p. 446, wrote:

> a husband cannot by law be guilty of ravishing his wife, on account of the matrimonial consent which she cannot retract.

In the first [1822] edition of Archbold's, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases*, at p.259 it was stated, after a reference to Hale, "A husband also cannot be guilty of a rape upon his wife."

For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition. The first such case was *Reg. v. Clarence* [1888] 22 QBD 23, to which I shall refer later. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since

then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

In *S. v. H.M. Advocate*, 1989 SLT 469 the High Court of Justiciary in Scotland recently considered the supposed marital exemption in rape in that country. In two earlier cases, *H.M. Advocate v. Duffy*, 1983 SLT 7 and *H.M. Advocate v. Paxton*, 1985 SLT 96 it had been held by single judges that the exemption did not apply where the parties to the marriage were not cohabiting. The High Court held that the exemption, if it had ever been part of the law of Scotland, was no longer so. The principal authority for the exemption was to be found in *Hume's Criminal Law of Scotland*, first published in 1797. The same statement appeared in each edition, up to the fourth, by Bell, in 1844. At p. 306 of vol. 1 of that edition, dealing with art and part guilt of abduction and rape, it was said:

> This is true without exception even of the husband of the woman, who though he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may, however be accessory to that crime... committed upon her by another.

It seems likely that this pronouncement consciously followed Hale.

The Lord Justice-General, Lord Emslie, who delivered the judgment of the court, expressed doubt whether Hume's view accurately represented the law of Scotland even at the time when it was expressed and continued, 1989 SLT 469, 473:

> We say no more on this matter which was not the subject of debate before us, becaused we are satisfied that the Solicitor-General was well founded in his contention that whether or not the reason for the husband's immunity given by Hume was a good one in the 18th and early 19th centuries, it has since disappeared altogether. Whatever Hume meant to encompass in the concept of a wife's 'surrender of her person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time when he wrote. Then, no doubt, a married woman could be said to have subjected herself to her husband's dominion in all things. She was required to obey him in all things. Leaving out of account the absence of rights of property, a wife's freedoms were virtually non-existent, and she had in particular no right whatever to interfere in her husband's control over the lives and upbringing of any children of the marriage.
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> By the second half of the 20th century, however, the status of women, and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for all practical purposes equal partners in marriage and both husband and wife are tutors and curators of their children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse otained only by force. There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault. The modern cases of *H.M. Advocate v. Duffy*, [1983] SLT 7 and *H.M. Advocate v. Paxton*, [1985] SLT 96 show that any supposed implied consent to intercourse is not irrevocable, that separation may demonstrate that such consent has been withdrawn, and that in these circumstances a relevant charge of rape may lie against a husband. This development of the law since Hume's time immediately prompts the question: is revocation of a wife's implied consent to intercourse, which is revocable, only capable of being established by the act of separation? In our opinion the answer to that question must be no. Revocation of a consent which is revocable must

> depend on the circumstances. Where there is no separation this may be harder to prove but the critical question in any case must simply be whether or not consent has been withheld. The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. The reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applies today. There is now, accordingly, no justification for the supposed immunity of a husband. Logically the only question is whether or not as a matter of fact the wife consented to the acts complained of, and we affirm the decision of the trial judge that charge 2(b) is a relevant charge against the appellant to go to trial.

I consider the substance of that reasoning to be no less valid in England than in Scotland. On grounds of principle there is now no justification for the marital exception in rape.

It is now necessary to review how the matter stands in English case law. In *Reg. v. Clarence (supra),* a husband who knew that he suffered from a venereal disease communicated it to his wife through sexual intercourse. He was convicted on charges of unlawfully inflicting grievous bodily harm contrary to s. 20 of the Offences Against the Person Act 1861 and of assault occasioning actual bodily harm contrary to s. 47 of the same Act. The convictions were quashed by a court of 13 judges of Crown Cases Reserved, with four dissents. Consideration was given to Hale's proposition, and it appears to have been accepted as sound by a majority of the judges. However, Wills J. said, at p. 33, that he was not prepared to assent to the proposition that rape between married persons was impossible. Field J. (in whose judgment Charles J. concurred) said, at p. 57, that he should hesitate before he adopted Hale's proposition, and that he thought there might be many cases in which a wife might lawfully refuse intercourse and in which, if the husband imposed it by violence, he might be held guilty of a crime.

In *Rex v. Clarke* [1949] 2 All ER 448 a husband was charged with rape upon his wife in circumstances where justices had made an order providing that the wife should no longer be bound to cohabit with the husband. Byrne J. refused to quash the charge. He accepted Hale's proposition as generally sound, but said, at p. 449:

> The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercouse was revoked. Thus, in my opinion, the husband was not entitled to have intercourse with her without her consent.

In *Reg. v. Miller* [1954] 2 QB 282 the husband was charged with rape of his wife after she had left him and filed a petition for divorce. He was also charged with assault upon her occasioning actual bodily harm. Lynskey J. quashed the charge of rape but refused to quash that of assault. He proceeded on the basis that Hale's proposition was correct, and also that *Rex v. Clarke* had been rightly decided, but took the view, at p. 290, that there was no evidence which entitled him to say that the wife's implied consent to marital intercourse had been revoked by an act of the parties or by an act of the court. As regards the count of assault, having referred to *Reg. v. Jackson* [1891] 1 QB 671, where it was held that a husband had no right to confine his wife in order to enforce a decree for restitution of conjugal rights, he said, at pp. 291-292:

> It seems to me, on the reasoning of that case, that although the husband has a right to marital intercourse, and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right, and if he does so he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision.

So the case had the strange result that although the use of force to achieve sexual intercourse was criminal the actual achievement of it was not. Logically, it might be thought that if a wife be held to have by marriage given her implied consent to sexual intercourse she is not entitled to refuse her husband's advances and that if she resists then he is entitled to use reasonable force to overcome that resistance.

This indicates the absurdity of the fiction of implied consent. In the law of Scotland, as Lord Emslie observed in *S. v. H.M. Advocate*, [1989] S.L.T. 469, 473, rape is regarded as an aggravated assault, of which the achievement of sexual intercourse is the worst aggravating feature. It is unrealistic to sort out the sexual intercourse from the other acts involved in the assault and to allow the wife to complain of the minor acts but not the major and most unpleaseant one.

The next case is *Reg. v. O'Brien (Edward)* [1974] 3 All ER 663, where Park J. held that a decree nisi effectively terminated a marriage and revoked the wife's implied consent to marital intercourse, so that subsequent intercourse by the husband without her consent constituted rape. There was a similar holding by the Criminal Division of the Court of Appeal in *Reg. v. Steele* [1976] 65 Cr. App. R. 22 as regards a situation where the spouses were living apart and the husband had given an undertaking to the court not to molest his wife. A decision to the like effect was given by the same court in *Reg. v. Roberts* [1986] Crim. L.R. 188, where the spouses had entered into a formal separation agreement. In *Reg. v. Sharples* [1990] Crim. L.R. 198, however, it was ruled by Judge Fawcus that a husband could not be convicted of rape upon his wife in circumstances where there was in force a family protection order in her favour and he had sexual intercourse with her against her will. The order was made under s. 16 of the Domestic Proceedings and Magistrates Courts Act 1978 in the terms that "the respondent shall not use or treaten to use violence against the person of the applicant." Judge Fawcus took the view that it was not to be inferred that by obtaining an order in these terms the wife had withdrawn her consent to sexual intercourse.

There should be mentionred next a trio of cases which were concerned with the question whether acts done by a husband preliminary to sexual intercourse with an estranged wife against her will could properly be charged as indecent assaults. The cases are *Reg. v. Caswell* [1984] Crim. L.R. 111, *Reg. v. Kowalski* [1987] 86 Cr. App. R. 339, and *Reg. v. H.* (unreported), 5 October 1990, Auld J. The effect of these decisions appears to be that in general acts which would ordinarily be indecent but which are preliminary to an act of normal sexual intercourse are deemed to be covered by the wife's implied consent to the latter, but that certain acts, such as fellatio, are not to be so deemed. Those cases illustrate the contortions to which judges have found it necessary to resort in face of the fiction of implied consent to sexual intercourse.

The foregoing represent all the decisions in the field prior to the ruling by Owen J. in the present case. In all of them lip service, at least, was paid to Hale's proposition. Since then there have been three further decisions by single judges. The first of them is *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755. There were nine counts in an indictment against a husband and a co defendant charging various offences of a sexual nature against an estranged wife. One of these was of rape as a principal. Simon Brown J. followed the decision in *S. v. H.M. Advocate* [1989] S.L.T. 469 and held that the whole concept of a marital exemption in rape was misconceived. He said, at p. 758:

> Were it not for the deeply unsatisfactory consequences of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late 20th century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give. Count seven accordingly remains and will be left to the jury without any specific direction founded on the concept of marital exemption.

A different view was taken in other two cases, by reason principally of the terms in which rape is defined in s. 1(1) of the Sexual Offences (Amendment) Act 1976, *viz*:

> For the purposes of s. 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if
>
> (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
>
> (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; ...

In *Reg. v. J. (Rape: Marital Exemption)* [1991] 1 All ER 759 a husband was charged with having raped his wife, from whom he was

living apart at the time. Rougier J. ruled that the charge was bad, holding that the effect of s. 1(1)(a) of the Act of 1976 was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He took the view that the word "unlawful" in the subsection meant "illict", that is outside marriage, that being the meaning which in *Reg. v. Chapman* [1959] 1 QB 100 it had been held to bear in s. 19 of the Sexual Offences Act 1956. Then in *Reg. v. S.* (unreported), 15 January 1991, Swinton-Thomas J. followed Rougier J. in holding that s. 1(1) of the Act of 1976 preserved the marital exemption subject to the established common law exeptions. Differing, however, from Rougier J., he took the view that it remained open to judges to define further exceptions. In the case before him the wife had obtained a family protection order in similar terms to that in *Reg. v. Sharples* [1990] Crim. L.R. 198. Differing from Judge Fawcus in that case, Swinton-Thomas J. held that the existence of the family protection order created an exception to the marital exemption. It is noteworthly that both Rougier J. and Swinton-Thomas J. expressed themselves as being regretful that s. 1(1) of the Act of 1976 precluded them from taking the same line as Simon Brown J. in *Reg. v. C. (Rape: Martial Exemption)* [1991] 1 All ER 755.

The position then is that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether s. 1(1) of the Act of 1976 presents an insuperable obstacle to that sensible course. The argument is that "unlawful" in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape.

Reg. v. Chapman [1959] 1 QB 100 is founded on in support of the favoured construction. That was a case under s. 19 of the Sexual Offences Act 1956, which provides:

> (1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man.
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> (2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of 18 or over and has reasonable cause for the belief.

It was argued for the defendant that "unlawful" in that section connoted either intercourse contrary to some enactment or intercourse in a brothel or something of that kind. Donovan J., giving the judgment of the Court of Criminal Appeal, rejected both interpretations and continued, at p. 105:

> If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word 'unlawful' in s. 19 is either surplusage or means 'illicit'. We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view, the word simply means 'illicit', that is, outside the bond of marriage. In other words, we take the same view as the trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament.
>
> It is also reinforced by the alternatives specifically mentioned in ss. 17 and 18 of the Act, that is, 'with the intent that she shall marry, or have unlawful intercourse ...'

In that case there was a context to the word "unlawful" which by cogent reasoning led the court to the conclusion that it meant outside the bond of marriage. However, even though it is appropriate to read the Act of 1976 alongside that of 1956, so that the provisions of the latter

Act form part of the context of the former, there is another important context to s. 1(1) of the Act of 1976, namely the existence of the exceptions to the marital exemption contained in the decided cases. Sexual intercourse in any of the cases covered by the exceptions still takes place within the bond of marriage. So if "unlawful" in the subsection means "outside the bond of marriage" it follows that sexual intercourse in a case which falls within the exceptions is not covered by the definition of rape, notwithstanding that it is not consented to by the wife. That involves that the exceptions have been impliedly abolished. If the intention of Parliament was to abolish the exceptions it would have been expected to do so expressly, and it is in fact inconceivable that Parliament should have had such an intention. In order that the exceptions might be preserved, it would be necessary to construe "unlawfully" as meaning "outside marriage or within marriage in situation covered by one of the exceptions to the marital exemption". Some slight support for that construction is perhaps to be gathered from the presence of the words "who at the time of the intercourse does not consent to it," considering that a woman in a case covered by one of the exceptions is treated as having withdrawn the general consent to intercourse given on marriage but may nevertheless have given her consent to it on the particular occasion. However, the gloss which the suggested construction would place on the word "unlawfully" would give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion. In *Reg. v. Chapman* Donovan LJ accepted, at p. 102, that the word "unlawfully" in relation to carnal knowledge had in many early statutes not been used with any degree of precision, and he referred to a number of enactments making it a felony unlawfully and carnally to know any woman-child under the age of 10. He said, at p. 103 "one would think that all intercourse with a child under 10 would be unlawful; and on that footing the word would be mere surplusage." The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment, as it clearly fell to be in those referred to by Donovan LJ. That was the view taken of it by this House in *McMonagle v. Westminister City Council* [1990] 2 AC 716 in relation to paragraph 3A of Schedule 3 to the Local Government (Miscellanous Provisions) Act 1983.

I am therefore of the opinion that s. 1(1) of the Act of 1976 presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no part of the law of England. The Court of Appeal (Criminal Division) took a similar view. Towards the end of the judgment of that court Lord Lane CJ said, at p. 1074:

> The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

I respectfully agree.

My Lords, for these reasons I would dismiss this appeal, and answer the certified question in the affirmative.

Lord Brandon of Oakbrook: My Lords, for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I would answer the certified question in the affirmative and dismiss the appeal.

Lord Griffiths: My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

Lord Ackner: My Lords, for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I, too, would answer the certified question in the affirmative and dismiss the appeal.

Lord Lowry: My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.